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Supreme Court, U.S.
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No. 99-1422

In The

Supreme Court of the United States

DAVID L. FLEMING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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5 pp

INTRODUCTION

Petitioner is generally satisfied that his original petition already addresses all of the arguments set forth in the Brief for the United States in Opposition. However, Petitioner feels compelled to submit this short reply to respond to a materially misleading statement contained in the government's factual statement.

GOVERNMENT'S STATEMENT

In the government's statement, at page 4 of its brief, the government appears to contend that the question posed to petitioner at his June 18, 1991 deposition would have obligated him to disclose the payment he received from the personal property proceeds and that petitioner, therefore, concealed such payment from the United States Trustee and/or committed perjury. The actual question asked and the answer given are as follows:

> "Q Excuse me. Let me narrow the question. With respect to these cases, what dollar amounts have you been paid towards these cases from nondebtor sources?
>
> A With regard to Mariner Realty Associates, Mariner Enterprises of Pensacola, Mariner Enterprises of Fort Walton, and Mariner Enterprises of Panama City, collectively, Mr. Yost has probably paid less than $10,000. And that was probably paid prior to December – the end of December 1989, or shortly thereafter, which was the time when the escrow accounts were created."

Thus, it is readily apparent that the question was asked only as to work done on the referenced bankruptcy cases and that it did not ask for disclosure of payments received for nonbankruptcy work done for Wallace and Sara Yost. It is undisputed in this case that the payment received by petitioner from the personal property sale was for nonbankruptcy work done by petitioner for Mr. and Mrs. Yost. Since petitioner has already pointed out in his initial petition that the testimony was not false and that the court of appeals' reliance on such an impertinent and immaterial factual conclusion was a mistake, it is indeed unfortunate that the government would perpetuate that mistake by using it as a factual basis for its argument here.

GOVERNMENT'S ARGUMENT

Since the need for this reply is presented, petitioner will use the opportunity to point out one very misleading argument contained in the government's brief, even though it should be readily apparent to the Court. At page 14 of the government's brief, the government attempts to tie a quote from *United States v. Gellene*, 182 F.3d 578, 588 (7th Cir. 1999), to the jury instruction given in the present case. Petitioner would remind the Court that he was not charged in this case with conspiracy to make a false oath or account. Materiality in the context of an alleged concealment of property would obviously be

different.[1] The government does not otherwise explain how the noted instruction could conceivably be deemed to be an adequate substitute for an instruction as to materiality.

With regard to the government's contention that petitioner waived his ability to rely upon the lack of a materiality instruction, petitioner concedes that his counsel did not request such an instruction at trial. Petitioner suggests, however, that such a request would have been futile prior to this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), given the law as it existed in the Eleventh Circuit. Moreover, petitioner has not even had the opportunity that the defendant had in *Neder* to have the trial court make a factual determination as to materiality. Certainly this court is not in a position to make such a determination based solely upon the representations contained in the government's brief. This is the reason that petitioner suggested in his original petition that the court may prefer to utilize *habeas corpus* jurisdiction in this case.

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[1] Cases such as *United States v. Edgar*, 971 F.2d 89 (8th Cir. 1992) strongly suggest by analogy that in a concealment case the instruction would require that the subject property be property of the debtor or otherwise material to the administration of the case (i.e., property as to which the exemption is questioned).

CONCLUSION

The government's brief does not appear to seriously challenge the jurisdiction of the Court to grant certiorari in this case or the appropriateness thereof. For the reasons set forth in petitioner's original petition, as supplemented herein above, petitioner again suggests that the Court does have the jurisdiction to hear this case and renews his request that the Court exercise its discretion in favor of hearing the case.

Respectfully submitted,

DAVID L. FLEMING